PP v. UNITED OVERSEAS BANK (M) BHD

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CRIMINAL APPEAL NO: MT-42H-21-04-2016]
26 MAY 2017

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFA') – Section 4 – Fraud perpetrated by bank officer – Discovery that monies passed by customer to bank officer not placed in fixed deposits – Bank officer fraudulently opened and deposited monies into accounts under customer's name – Monies transferred out from accounts into current account of bank officer's friend and used to purchase unit trusts – Sessions Court issued notice to third parties under s. 61(2) of AMLATFA to show cause as to why scheduled property should not be forfeited – Bank and customer staked claim at Sessions Court – Whether scheduled property should be released to bank – Whether bank satisfied requirements under s. 61(4)(a) to (e) of AMLATFA*

One Madam Lim became a customer of the respondent in 2010. Upon the recommendation of the respondent's officer ('Chua') that the respondent offered fixed deposits returns at the highest interest rate of 5.2% per annum, Madam Lim had, since September 2010 and over a period of three years handed to Chua, banker's cheques, cashier's orders, personal cheques and cash totalling to RM21,076,122.88 to be placed as fixed deposits with the respondent. Sometime in early 2013, Madam Lim discovered that the monies passed to Chua had not been placed in fixed deposits with the respondent. Chua, who had perpetrated fraud, had absconded and could not be traced. Following a police report by Madam Lim, investigations revealed that instead of placing the monies in fixed deposits, Chua had opened and deposited these monies into two e-Saving Accounts under Madam Lim's name. Over the same period of time, the monies were transferred out from these e-Saving Accounts into the current account of Chua's friend ('Alex'). In turn, Alex purchased and sold unit trusts through his unit trust account ('UTA') and the source for these purchases came from Alex's current account and ultimately, from Madam Lim. The Sessions Court convicted Alex with 81 counts of offences under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFA'). The Sessions Court Judge ('the SCJ') then issued notice to third parties pursuant to s. 61(2) of the AMLATFA to the effect that any third party who claims to have any interest in the property to show cause as to why the residual unit trusts in Alex's UTA totalling to RM1,155,275.88 ('the scheduled property') shall not be forfeited to the Government of Malaysia. The respondent and Madam Lim were the only claimants who staked a claim on the scheduled property. In considering the respondent's claim, the SCJ took into account the settlement agreement ('the SA') entered between Madam Lim and the respondent arising from a civil suit in 2014

('the civil suit'). In 2014, Madam Lim filed the civil suit at the High Court against the respondent, naming it as one of the defendants, claiming for the sum of RM21,076,122.88. The respondent and Madam Lim entered into the SA to amicably settle the civil suit, pursuant to which, (i) the civil suit against the respondent was withdrawn without liberty to file afresh; (ii) the respondent paid Madam Lim the sum of RM20,329,547.52 ('the settlement sum'); (iii) Madam Lim agreed that the respondent shall be absolutely entitled to, *inter alia*, the unit trusts in Alex's UTA upon payment of the settlement sum and assigned her rights in them to the respondent; and (iv) the SA constitutes a full and final settlement of the civil suit and all actions, claims and disputes which the parties have against each other. Based on these findings of fact, the SCJ decided that the respondent, as assignee had a legitimate interest in the scheduled property. The SCJ allowed the claim by the respondent and Madam Lim and ordered the scheduled property to be released and returned to them. Hence, the present appeal. The appellant only appealed against the decision in allowing the respondent's claim and not that of Madam Lim. According to the appellant, the SCJ erred in law and in fact in holding that all the requirements under s. 61(4)(a) to (e) of the AMLATFA have been satisfied by the respondent and that the scheduled property be released to the respondent.

Held (dismissing appeal):

(1) Show cause proceedings under s. 61 of the AMLATFA are *quasi*-criminal in nature. Before the property claimed could be released to any third party claimant, all the requirements set out in s. 61(4)(a) to (e) of AMLATFA, which are to be read conjunctively, must be satisfied by the third party on a balance of probabilities. (para 9)

(2) The SCJ had correctly held that the respondent had a legitimate interest in the scheduled property. The SA was not merely confined to the civil suit. It was a global settlement of all claims against each other and by that settlement, Madam Lim had, in consideration of a large sum of money paid by the respondent, agreed to relinquish and assign all her rights in and to the monies in Alex's UTA. The assignment from Madam Lim to the respondent was a lawfully valid absolute legal assignment for valuable consideration. The court should give effect to and recognise the contractual rights as determined between the parties as there was nothing untoward or unlawful about it. (paras 13, 15 & 17)

(3) The SCJ had correctly held that there was no participation, collusion or involvement on the part of Madam Lim, regarding the offences committed by Chua and/or Alex, given that she was the victim rather than the co-perpetrator or enabler. The word 'mangsa' or victim was used 13 times by the appellant to describe Madam Lim in the facts of the case tendered against Alex in the criminal trial. The appellant was estopped from asserting the contrary. Furthermore, there was no

evidence adduced to show that Madam Lim was not a victim. Instead, evidence showed that Chua, an employee of the respondent, was the main culprit. Chua had acted out of his authority as an employee of the respondent by taking in fixed deposits from Madam Lim and issuing forged receipts. What Chua did was clearly not in accord with that which was rightfully expected of him in the normal scope of his duties. Thus, vicarious liability could not be attached to the respondent. (paras 20, 21, 25 & 27)

(4) The appellant did not lead any evidence to establish that Madam Lim and/or the respondent had knowledge or were intentionally ignorant of the illegal enterprise. As a victim, Madam Lim could not have had any knowledge or be intentionally ignorant of the fraudulent acts of the perpetrators. The respondent too could not have had any knowledge or be intentionally ignorant of the fraudulent acts of Chua and/or Alex. Chua's acts were unknown to any other officer or employee of the respondent. (paras 29, 30 & 31)

(5) There was no evidence to indicate that either Madam Lim or the respondent had acquired any rights in and to the scheduled property from Alex. Madam Lim's rights to the scheduled property arose from the uncontroverted fact that the unit trusts in Alex's UTA were purchased using monies that belonged to her. The respondent's rights to the scheduled property flowed from Madam Lim's assignment of her rights to the scheduled property as contained in the SA. (para 33)

(6) Madam Lim did not have any reasons to suspect Chua was a fraudster. Chua was an employee of the respondent, a well-established financial institution. Madam Lim had received 73 fixed deposit slips from Chua for the money deposited and all these slips bore the respondent's letterhead. Furthermore, all the banker's cheques, cashier's orders and personal cheques given by Madam Lim to Chua were made payable in the name of Madam Lim; thus it could only be banked into an account bearing Madam Lim's name. Evidence also showed that Madam Lim had taken steps as a prudent customer. When Madam Lim's husband became suspicious with Chua, Madam Lim went to the respondent's branch and discovered the fraud. The appellant did not lead any evidence or challenge the assertion of Madam Lim and the respondent to establish that the respondent could have done more to prevent the fraud or that they were lackadaisical. Madam Lim and the respondent had done all that could reasonably be expected of them to prevent the illegal use of the funds. (paras 34 & 37)

Case(s) referred to:

Antonio Dias Caldeira v. Frederick Augustus Gray [1934] 1 LNS 5 PC ***(refd)***
Chuah Eng Khong v. Malayan Banking Bhd [1992] 2 CLJ 917 FC ***(refd)***
Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
El Chong Motor Trading Sdn Bhd lwn. PP [2017] 3 CLJ 592 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lim Long Yew & Yang Lain; Md Sukri Shahudin & Yang Lain (Pihak Ketiga) lwn. PP [2017] 2 CLJ 594 HC ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
PP lwn. Raja Noor Asma Raja Harun [2013] 5 CLJ 656 HC ***(refd)***
PP lwn. Rashidi Abdullah [2015] 3 CLJ 194 CA ***(refd)***
PP v. Song Siew Weng & Ors [2015] MLRHU 1244 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Teh Tek Soon lwn. PP [2015] 1 LNS 1504 CA ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals [2015] 2 CLJ 766 CA ***(refd)***
Zurich Insurance Malaysia Bhd v. AM Trustee Bhd & Anor; Meridian Asset Management Sdn Bhd (Third Party) And Another Case [2014] 1 CLJ 397 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 61(2), (4)(a), (b), (c), (d), (e)

For the prosecution - Atikah Liana Sharif; DPP
For the appellant - Andrew Chiew Ean Vooi & Kenneth Seet; M/s Lee Hishamudin Allen & Gledhill

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] This is an appeal by the Public Prosecutor against the decision of the learned judge of the Melaka Sessions Court delivered on 21 April 2016. I had dismissed the appeal on 21 March 2017 on grounds stated below.

[2] The learned Sessions Judge had in exercise of the powers conferred by sub-s. 61(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFA") given a notice to third parties to the effect that any third party who claims to have any interest in the property specified in the schedule to the notice, which is the subject matter in the charge against one Alex Chong Siau Meng (NRIC No. 880403-04-5077), to attend before Sessions Court 3, Melaka on 15 July 2015 at 9am to show cause as to why the property shall not be forfeited to the Government of Malaysia. The property in question was cash value totaling RM1,155,275.88 and any accretion to it in the Unit Trust Account No. 25227054406 in the name of Alex Chong Siau Meng at the United Overseas Bank (Malaysia) Berhad, Plaza Mahkota Branch, No. 1 Jalan PM 5, Plaza Mahkota, 75000 Melaka ("scheduled property"). The notice to third parties was published in the Federal Government Gazette Notification on 13 July 2015.

[3] The respondent and one Madam Lim Guat Moey ("Madam Lim") were the only claimants to appear at the show cause proceedings, who staked a claim on the scheduled property. The show cause proceedings was heard and completed on 15 January 2016, whereat the appellant did not call any witnesses whilst the respondent and Madam Lim called the following witnesses:

(i) Inspector Daimine bin Jamilin ("SPK1");

(ii) Madam Lim ("SPK2");

(iii) Tay Bee Tin ("SPK3"); and

(iv) Yeow Kheng Leh ("SPK4").

[4] On 21 April 2016, the learned Sessions Judge allowed the claim by the respondent and Madam Lim and ordered the scheduled property to be released and returned to the respondent and Madam Lim. The order of the Sessions Court dated 21 April 2016 is found at pp. 10 to 12 of the record of appeal vol. 1. The learned Sessions Judge allowed the claim because:

(a) the respondent and/or Madam Lim had proven on a balance of probabilities, through witnesses and documents produced at the proceedings, that all the requirements under s. 61(4)(a) to (e) of AMLATFA had been satisfied; and

(b) based on the facts and evidence of the witnesses, the respondent and/or Madam Lim are the *bona fide* or genuine claimants.

[5] The appellant lodged this appeal on 25 April 2016. In the notice of appeal, the appellant appealed only against the decision that allowed the respondent's claim and not that of Madam Lim. The petition of appeal also relates only to the decision that allowed the respondent's claim. In the petition of appeal, the appellant contends that the learned Sessions Judge erred in law and in fact when he held that all the requirements under s. 61(4)(a) to (e) of the AMLATFA have been satisfied by the respondent and that the scheduled property be released to the respondent.

[6] In the circumstance, learned counsel for the respondent submits that the Sessions Court's decision that allowed the claim by Madam Lim cannot be questioned in this appeal and it should not be disturbed, as there is no appeal against it. I would have to agree with that submission, as this court exercising its appellate jurisdiction would be confined to address the appeal as contained in the notice of appeal and the petition of appeal. Therefore, in considering this appeal, I have confined it to the appeal only against the decision of the Sessions Court ordering the scheduled property to be released and returned to the respondent.

[7] The antecedent facts giving rise to the show cause proceedings are as follows:

A (a) Madam Lim is a teacher in Melaka for more than 22 years. Chua Ken Juan ("Chua") was at the material time an officer of the respondent. Madam Lim became a customer of the respondent sometime in 2010 when Chua was working for the respondent. Upon Chua's recommendation that the respondent offered fixed deposits returns at a high-interest rate
B of 5.2% per annum, Madam Lim had since September 2010 and over a period of three years handed to Chua banker's cheques, cashier's orders, personal cheques and cash totaling RM21,076,122.88 to be placed as fixed deposits with the respondent. Madam Lim's source of funds is her husband who runs a successful business.

C (b) Sometime in early 2013, Madam Lim visited the respondent's Plaza Mahkota Branch and discovered that the monies passed to Chua had not been placed in fixed deposits with the respondent, as the same were not reflected in the respondent's computer banking system. Thereafter, Madam Lim met the respondent's Plaza Mahkota Branch Manager and also the respondent's officer one Yeow Kheng Leh ("SPK4") on several
D occasions and found out that her monies had not been placed as fixed deposits and that there was fraud perpetrated by Chua, who had by then absconded and could not be traced.

(c) Madam Lim lodged a police report on 7 June 2013 and the respondent
E too lodged police reports on 10 June 2013 and 12 June 2013 over this fraud. The police then came to the respondent's branches and carried out their investigations. The respondent's officers including Tay Bee Tin ("SPK3") and Yeow Kheng Leh ("SPK4") were interviewed by the police and relevant documents were handed to the police. On 14 June 2013, the police issued an order to freeze the bank accounts opened under
F Madam Lim's name. The accounts were later unfrozen on grounds that Madam Lim was the victim and these accounts belong to her.

(d) Police investigations revealed that instead of placing the monies in fixed deposits, Chua had opened two e-Savings Accounts under Madam Lim's name, ie, e-Savings Account No. 1 at the Plaza Mahkota Branch and e-
G Savings Account No. 2 at Malim Branch. Between October 2010 and May 2013, Chua deposited the monies into these two e-Savings Accounts. Over the same period of time, the money was transferred out from these two e-Savings Account to the current account of one Alex Chong Siau Meng ("Alex Chong"), who is Chua's friend. Between
H 9 November 2011 and 12 April 2013 Alex Chong purchased and sold unit trusts through Alex Chong's unit trust account, which is the subject matter of the notice to third parties and the show cause proceedings. The source of funds to purchase the unit trusts in Alex Chong's unit trust account came from Alex Chong's current account, and ultimately from
I Madam Lim.

(e) Alex Chong was charged at the Melaka Sessions Court on 22 August 2014 with 81 counts of offences under s. 4(1)(a) of AMLATFA. The offences related to the monies handed by Madam Lim to Chua to be

placed in fixed deposits. On 20 April 2014, Alex Chong pleaded guilty to all charges. Consequently, the Sessions Court convicted Alex Chong on all charges and imposed a fine of RM120,000 and in default six months imprisonment for each charge.

(f) The Sessions Court had then issued the notice to third parties pursuant to s. 61(2) of the AMLATFA and conducted the show cause proceedings in respect of the residual unit trusts in Alex Chong's unit trust account.

[8] The appellant contends that the learned Sessions Judge erred in his finding that the requirements under s. 61(4) AMLATFA had been satisfied. Section 61(4) of AMLATFA reads:

> (4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:
>
> (a) the claimant has a legitimate legal interest in the property;
>
> (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) which is the object of the proceedings can be imputed to the claimant;
>
> (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;
>
> (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and
>
> (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

In *PP v. Lau Kwai Thong* (MTSA Kes No. 44-22-2008 – unreported) my learned brother Abang Iskandar Abang Hashim JCA (as he then was) in construing the provisions of s. 61(4)(a) to (e) of AMLATFA had held:

> I had considered the submissions on the true interpretation to be given to the manner as to how the five paragraphs in section 61(4)(a) to (e) of the said Act ought to be implemented. It is my considered view that the said 5 paragraphs as so enumerated, have to be read conjunctively. It is my view that this third party claimant's evidence did not in any way address all the specific circumstances that have been outlined under the said paragraphs under section 61(4)(a) to (e) of the said Act, which a claimant staking a claim on the alleged illegal property must successfully satisfy on the balance of probabilities before the court can properly release the claimed property to a *bona fide* third party.

Similar pronouncement was made by my learned brother Kamardin Hashim J (as he then was) in *PP lwn. Raja Noor Asma Raja Harun* [2013] 5 CLJ 656 in construing a third party claim under s. 61(4)(a) to (e) of AMLATFA, where he held:

> … mahkamah ini bersetuju dengan pandangan tersebut dan ingin menambah bahawa beban pembuktian adalah diatas bahu pihak ketiga yang membuat tuntutan untuk membuktikan atas imbangan kebarangkalian bahawa mereka adalah penuntut pihak ketiga yang suci hati. Untuk membuktikan bahawa mereka adalah penuntut yang suci hati maka mereka hendaklah mengemukakan keterangan bagi memenuhi kehendak-kehendak seperti di peruntukkan dibawah perenggan (a) hingga (e) tersebut. Sekiranya mahkamah berpuashati bahawa perkara-perkara tersebut terbukti dan telah dipenuhi, harta yang dituntut bolehlah dikembalikan kepada penuntut pihak ketiga yang suci hati tersebut …

Both these cases were referred to with approval by the Court of Appeal in *Teh Tek Soon lwn. PP* [2015] 1 LNS 1504, where my learned brother Balia Yusof Hj Wahi JCA (as he then was) in delivering the judgment of the court on the interpretation and application of s. 61(4)(a) to (e) AMLATFA held as follows:

> [17] Mengikut peruntukan di atas, adalah jelas bahawa mahkamah akan hanya memulangkan harta tersebut kepada Perayu apabila mahkamah berpuas hati bahawa Perayu telah berjaya memenuhi kesemua kehendak di dalam peruntukan tersebut. Peruntukan subseksyen 4 (a) hingga (e) hendaklah dibaca secara "conjunctively". PK di dalam alasan penghakimannya telah merujuk kepada dua kes yang lain di mana pendekatan yang sama adalah terpakai. (*PP v. Raja Noor Asma Raja Harun* [2013] 5 CLJ 656 dan *Pendakwa Raya v. Lau Kwai Thong*, Mahkamah Tinggi Shah Alam Permohonan Jenayah No. 44-20-2008).

[9] Therefore, it is well settled that show cause proceedings under s. 61 of AMLATFA are *quasi*-criminal in nature, and before the property claimed can be released to any third party claimant, all the requirements set out in s. 61(4)(a) to (e) of AMLATFA, which are to be read conjunctively, must be satisfied by the third party claimant on a balance of probabilities. See also the cases of *PP v. Song Siew Weng & Ors* [2015] MLRHU 1244, HC; *El Chong Motor Trading Sdn Bhd lwn. PP* [2017] 3 CLJ 592, HC; and *Lim Long Yew & Yang Lain; Md Sukri Shahudin & Yang Lain (Pihak Ketiga) lwn. PP* [2017] 2 CLJ 594, HC.

[10] Now, with these background facts and the applicable law, let me consider the merits of the appeal. The learned Sessions Judge at para. 5 of the grounds of judgment states as follows:

> Saya telah membenarkan tuntutan pihak ketiga SPK1 dan UOB atas alasan bahawa penuntut-penuntut tersebut telah berjaya membuktikan atas imbangan kebarangkalian, melalui kesemua saksi dan dokumen yang telah dikemukakan dalam prosiding ini, yang kesemua kehendak di bawah seksyen 61(4)(a)-(e) AMLATFA 2001 dipenuhi. Berdasarkan penilaian objektif fakta dan keterangan saksi dalam prosiding ini, diputuskan juga SPK1 dan/atau UOB adalah merupakan penuntut yang suci hati/*bona fide*.

The learned Sessions Judge in pp. 6 to 8 of the grounds of judgment then canvasses each of the requirements of s. 61(4)(a) to (e) of AMLATFA. I will now consider them one by one.

Whether Madam Lim And The Respondent, As Claimants Have A Legitimate Legal Interest In The Property?

[11] This is the first requirement under s. 61(4)(a) of AMLATFA. The learned Sessions Judge, in answering this question, made the following findings of fact:

(i) Madam Lim is the actual owner of the monies in the Alex Chong's unit trust account because these monies originated from Madam Lim. The monies to purchase the unit trusts in Alex Chong's unit trust account can in equity be traced back to Madam Lim. This fact is uncontroverted as even the facts of case tendered by the appellant against Alex Chong in Criminal Case – Kes Tangkap No. 62-(25-52)-089-2014 – at the Sessions Court, supports Madam Lim's contention. In fact, in that case, the appellant asserted that Chua had "menipu serta mendorong mangsa untuk menyerahkan sejumlah wang kepadanya" and used the accounts under Alex Chong's name "untuk memindahkan wang hasil dari penipuannya terhadap mangsa". Both Madam Lim's and SPK4's evidence in this regard was not challenged or controverted by the appellant. Therefore, based on the overwhelming evidence, the learned Sessions Judge had correctly held that Madam Lim had a legitimate legal interest in the scheduled property.

(ii) Madam Lim had on 11 April 2014 filed a civil suit against Chua and the respondent, as defendants, in the High Court at Melaka claiming the sum of RM21,076,122.88, which is the total sum of monies that Madam Lim had passed to Chua to be placed in fixed deposits with the respondent. The respondent filed its defence to that claim. Chua failed to appear and judgment in default was sealed against him. On 25 November 2014, Madam Lim and the respondent entered into a settlement agreement to amicably settle the Melaka High Court civil suit, pursuant to which:

(a) the Melaka High Court civil suit was withdrawn against the respondent without liberty to file afresh;

(b) the respondent paid Madam Lim the sum of RM20,329,547.52 ("settlement sum") sometime in December 2014;

(c) Madam Lim agreed that the respondent shall be "absolutely entitled" to, among others, the unit trusts in Alex Chang's unit trust account upon payment of the settlement sum and assigned her rights in them to the respondent;

(d) the settlement agreement constitutes a full and final settlement of the civil suit and all actions, claims and disputes which the parties have against each other arising therefrom.

[12] The learned Sessions Judge, based on these findings of fact, and by virtue of the terms contained in the settlement agreement, and in particular Madam Lim's assignment of her interest in the monies in Alex Chong's unit trust account, decided that the respondent, as assignee, had a legitimate interest in the scheduled property.

[13] The appellant contends that the settlement agreement is not applicable in the show cause proceedings as it was made to amicably settle the Melaka High Court civil suit, which according to the appellant is distinct and separate from the show cause proceedings. I find that this argument is misconceived. The settlement agreement was not merely confined to the Melaka High Court civil suit. It was a global settlement of all claims against each other, and by that settlement, Madam Lim had in consideration of a large sum of money paid by the respondent agreed to relinquish and assign all her rights in and to the monies in Alex Chong's unit trust account. Clause 4.1 of the settlement agreement states that Madam Lim has assigned "absolutely all her rights, title and interest, present and future" over the unit trusts to the respondent.

[14] In this regard, it would be apposite to quote two relevant clauses in the settlement agreement. Clause 3 of the settlement agreement states:

> **3.1 Defendant's Entitlement**
>
> (a) The Plaintiff acknowledges and agrees that the Defendant shall be absolutely entitled to the Assets upon payment of the Settlement Sum in accordance with this agreement.

And cl. 4.1 of the settlement agreement reads:

> **4.1 Assignment**
>
> The Plaintiff hereby assigns to the Defendant absolutely all her rights, title and interests, present and future, in and to the Assets with effect from the date of payment of the Settlement Sum.

Thus, it is clear that the assignment was for valuable consideration, ie, in part the payment of the settlement sum. Hence, I find that the assignment from Madam Lim to the respondent is a lawfully valid absolute legal assignment for valuable consideration. See *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1, FC.

[15] The settlement agreement contains a valid absolute assignment and it is trite that the court should give effect to and recognise the contractual rights as determined between the parties as there is nothing untoward or unlawful about it. See *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917; [1998] 3 MLJ 97; *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513. As legal assignee of an absolute assignment, the respondent has a definite legal and beneficial interest in the scheduled property.

[16] The appellant contends that by entering into the settlement agreement and agreeing to pay the settlement sum to Madam Lim, the respondent admits liability or culpability, and as such the respondent does not have a legitimate legal interest in the scheduled property. Again, I do not find any merit in this argument as cl. 2.1(b) of the settlement agreement states clearly that the settlement sum paid by the respondent is "without any admission as to liability". Further, the settlement was entered into after the respondent had filed its defence in the Melaka High Court civil suit and had denied any wrongdoing. Therefore, it cannot be gainsaid that the respondent had admitted liability or culpability to Chua's and/or Alex Chong's unlawful acts by entering into the settlement agreement. The arrangement between Madam Lim and the respondent is akin to an insured subrogating his rights against a third party, say a tortfeasor, to the insurer in consideration of the insurer settling the insured's claim without admission of liability. Needless to say, such arrangements are common everyday occurrences.

[17] Furthermore, if the appellant's position were that Madam Lim has a legitimate legal interest in and to the scheduled property, then Madam Lim would have the legal right to lawfully assign that interest to anyone of her choosing. Thus, if Madam Lim decides to assign that interest to the respondent, it is not for the appellant to question her legitimate exercise of that right. Therefore, I find that the learned Sessions Judge had correctly held that the respondent had a legitimate legal interest in the scheduled property.

Whether Any Participation, Collusion Or Involvement With Respect To The Offence Under sub-s. 4(1) Which Is The Object Of The Proceedings Can Be Imputed To The Claimant?

[18] This is the second requirement under s. 61(4)(b) of AMLATFA that the claimant needs to negate. The learned Sessions Judge held that there was no participation, collusion or involvement by Madam Lim or the respondent in respect of the offences committed by Alex Chong under s. 4(1) of AMLATFA, which is the object of the proceedings. This finding of the learned Sessions Judge is found at paras. 9 to 17 of the grounds of judgment.

[19] I find that the learned Sessions Judge's findings in this regard are well supported by the evidence. Madam Lim was without a doubt a victim of the fraud perpetrated by Chua and Alex Chong. After Chua joined the respondent, Chua contacted Madam Lim and recommended her to place money as fixed deposits with the respondent. Chua managed to convince Madam Lim to hand money to him and in return she received a total of 73 fixed deposits slips. It is notable that these acknowledgment slips bear the respondent's letterhead and on the face of it appear genuine. Further, every time Madam Lim met Chua, Chua wore formal clothes and carried the bank's security identity tag. Madam Lim did not have any reason to suspect that Chua was a fraudster or that the acknowledgment slips were forged.

[20] There was no evidence adduced to show that Madam Lim was not a victim. At trial, Madam Lim denied that she acted under Chua's instruction and allowed herself to be cheated by Chua. Further, it was the appellant's case against Alex Chong that Madam Lim was a victim. In this regard, the learned Sessions Judge noted that the word "mangsa" or victim was used 13 times by the appellant to describe Madam Lim in the "fakta kes" or facts of case tendered against Alex Chong in the criminal trial. Additionally, when the police lifted the freeze on the accounts opened under Madam Lim's name, it was done on the premise that these accounts "adalah milik mangsa". Hence, the appellant would be estopped from asserting the contrary. The learned Sessions Judge had, therefore, correctly held that there was no participation, collusion or involvement on the part of Madam Lim, in regards the offences committed by Chua and/or Alex Chong, given that she was the victim rather than the co-perpetrator or enabler.

[21] As for the respondent, the evidence shows that Chua, an employee of the respondent, was the main culprit. There is no evidence that any other employee or officer of the respondent had colluded or acted in concert with Chua to perpetrate the crime. The respondent, upon being alerted by Madam Lim, immediately took steps to investigate the complaint and locate Chua. The evidence of SPK4 shows that SPK4 and the Branch Manager of the Malim Branch, one Ms Sim, had gone to Chua's house on 4 June 2013 to find him. They waited almost an hour at his house but could not meet him. SPK4 and Ms Sim also met Madam Lim on several occasions to explain to her the progress of their investigations and findings. The respondent had not been untruthful or tried to cover up the fraud committed by Chua. By all accounts, it seems that the respondent too is the victim of the fraud committed by Chua and/or Alex Chong, for they had to pay out the large settlement sum to Madam Lim, though without admitting liability.

[22] The respondent lodged two police reports and fully cooperated with the police investigators. In particular, SPK3 and SPK4 assisted by producing documents and explained the flow of funds from the accounts opened under Madam Lim's name to that of Alex Chong. This had led to the charges being preferred against Alex Chong. SPK3 and SPK4 were prosecution witnesses in the criminal case against Alex Chong and had been subpoenaed to give evidence at the trial.

[23] The appellant contends that the respondent is vicariously liable for the fraudulent acts committed by Chua, its employee and as such involvement in respect of the charges against Alex Chua can be imputed against the respondent. The learned Sessions Judge rejected this argument. The law requires that in order to establish vicarious liability, three factual conditions must be met:

(a) the existence of an employer-employee relationship;

(b) an actionable wrong or deviated action committed by the employee; and

(c) the employee acting within the course and scope of his employment.

[24] In respect of the third requirement, in *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals* [2015] 2 CLJ 766; [2015] 2 MLJ 607 my learned brother Zawawi Salleh JCA in delivering the unanimous decision of the Court of Appeal held that:

> ... 'an employee should act within the scope of his employment' to find his employer vicariously liable, has initially been interpreted by the courts in terms of the Salmond rule. An employee, according to the rule, was not acting within the scope of employment, if these wrongful actions or conduct was against the employer's instruction or interest.
>
> ...
>
> In our opinion, if a close connection between the deviated actions of an employee and the purpose or nature of his employment is established by certain factual evidence, an employee may be found to be acting within the scope of his employment.

The Court of Appeal further held that the question of whether such close connection exists is a determination that is dependent on the factual matrix of each case.

[25] In the present case, it is common ground that Chua is an employee of the respondent, but Alex Chong is not. It is also common ground that Chua and Alex Chong had committed the offences, which is the subject of the proceedings. However, the respondent argues that Chua had acted beyond his normal scope of work and that the unlawful acts were not very closely connected with the acts that Chua was authorised to do, and therefore vicarious liability cannot attach to the respondent. The learned Sessions Judge had quite correctly accepted this argument as these wrongful actions or conduct were against the employer's instructions or interest.

[26] SPK3 and SPK4 in their testimony explained that Chua's job scope was to "market the financial products offered by UOB" and that "nobody was authorised by UOB to issue acknowledgment slips for fixed deposits at the interest rate of 5.2% per annum". The respondent was not offering fixed deposits returns of 5.2% per annum and Chua was definitely not authorised by the respondent to take in fixed deposits and issue acknowledgment receipts/slips at interest rate of 5.2% per annum. Chua's job entailed the marketing of financial products offered by the respondent. Thus, clearly Chua had acted out of his authority as an employee of the respondent by taking in these fixed deposits from Madam Lim and issuing forged receipts. What Chua did was clearly not in accord with that which was "rightfully expected of him in the normal scope of his duties". Thus, vicarious liability cannot attach to the respondent. See *Zulkiply bin Taib & Anor v. Prabakar a/l Bala Krishna & Ors and Other Appeals, supra; and Zurich Insurance Malaysia Bhd v. AM Trustee Bhd & Anor; Meridian Asset Management Sdn Bhd (Third Party) And Another Case* [2014] 1 CLJ 397; [2014] 1 MLJ 736 per my learned brother Lee Swee Seng J.

[27] In addition to the above, it must be noted that the appellant did not lead any evidence contrary to that of SPK3 and SPK4 to establish otherwise, nor did the appellant challenge this evidence. The appellant must therefore be taken to have accepted the evidence – see *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212. Hence, I find that the learned Sessions Judge had correctly held that there was no participation, collusion or involvement of the respondent with the illegal enterprise of Chua and/or Alex Chong.

Whether The Claimant Lacked Knowledge And Was Not Intentionally Ignorant Of The Illegal Use Of The Property, Or If He Had Such Knowledge, Did Not Freely Consent To Its Illegal Use?

[28] This is the third requirement to be fulfilled by the claimant under s. 61(4)(c) of the AMLATFA. The learned Sessions Judge found that Madam Lim and the respondent did not have knowledge or were they intentionally ignorant of the fraudulent act committed by Chua and/or Alex Chong. This finding is found in paras. 18 to 23 of the grounds of judgment. Again, I find that the learned Sessions Judge's findings in this regard are well supported by evidence.

[29] The appellant concedes that Madam Lim is the victim of the fraud perpetrated by Chua and/or Alex Chong. As victim, Madam Lim could not have had knowledge or be intentionally ignorant of the fraudulent acts of the perpetrators. The evidence shows that Madam Lim had placed trust on Chua as an officer of the respondent and passed monies totaling more than RM20 million to him over a period of three years to be placed in fixed deposits. Madam Lim only discovered that something was amiss when she went to the Plaza Mahkota Branch sometime in June 2013 to enquire about the fixed deposits. Madam Lim acted immediately when she discovered the fraud by making a complaint to the respondent to recover the money and also lodging a police report.

[30] The respondent too could not have had any knowledge or be intentionally ignorant of the fraudulent acts of Chua and/or Alex Chong. Chua managed to convince Madam Lim to hand over a total sum of RM21,076,122.88 to him in the form of banker's cheques, cashier's orders, personal cheques and cash to be placed in fixed deposits over a period of three years. This was unknown to any other officer or employee of the respondent. Chua had issued 73 fixed deposit slips purportedly issued by the respondent, when in fact they were forgeries by Chua. Again, this was beyond the knowledge of the respondent's officers and employees. The evidence shows that when the respondent's officers, SPK3 and SPK4, found out about Chua's fraudulent acts they were utterly shocked. SPK4 in her testimony said:

> I was shocked. In fact, most of the officers at Malim Branch were surprised to learn that Chua had perpetrated a fraud case. This is mainly because we did not expect that Chua was able to plan and carry out a fraudulent scheme of high complexity involving a huge sum of customer's money despite the check and balance imposed by UOB on the transactions carried out by the customers. There is also no evidence to suggest that anyone from the bank colluded with Chua or acted together with him in perpetrating the crime.

Further SPK3 testified as follows:

> I was surprised because no one expects the transaction carried in relation to the E-Savings Account 1 were fraudulent and that Chua was able to carry out a fraudulent scheme involving huge sums of money by himself despite the check and balance imposed by UOB.

[31] The appellant, on the other hand, did not lead any evidence to negate these averments or to establish that Madam Lim and/or the respondent had knowledge or were intentionally ignorant of this illegal enterprise. The appellant also did not cross-examine the witnesses on the issue. Thus, the evidence of Madam Lim, SPK3 and SPK4 must be taken as unchallenged by the appellant and accepted. See *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212.

[32] Therefore, I find that the learned Sessions Judge had correctly held that Madam Lim and the respondent did not have knowledge and were not intentionally ignorant of the illegal use of the monies handed over by Madam Lim to Chua to be placed as fixed deposits.

Whether The Claimant Acquired Any Right In The Property From A Person Proceeded Against Under Circumstances That Give Rise To A Reasonable Inference That Any Right Was Transferred For The Purpose Of Avoiding The Eventual Subsequent Forfeiture Of The Property?

[33] This is the fourth requirement that the claimant needs to establish under s. 61(4)(d) of AMLATFA. The learned Sessions Judge held, and quite correctly I must add, that the requirement under s. 61(4)(d) was satisfied, as there was no evidence to indicate that either Madam Lim or the respondent had acquired any rights in and to the scheduled property from Alex Chong. Madam Lim's rights to the scheduled property arises from the uncontroverted fact the unit trusts in Alex Chong's unit trust account were purchased using monies that belong to her. The respondent's rights to the scheduled property flows from Madam Lim's assignment of her rights to the scheduled property as contained in the settlement agreement. Thus, there is absolutely no evidence indicating that the rights on the scheduled property acquired by the respondent flowed from Alex Chong such that it could give rise to a reasonable inference that such right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property.

Whether The Claimant Did All That Could Reasonably Be Expected To Prevent The Illegal Use Of The Property?

[34] This is the fifth and final requirement that the claimant needs to establish under s. 61(4)(e) of AMLATFA. The learned Sessions Judge had held that this requirement was satisfied as Madam Lim and the respondent had done all that could reasonably be expected to prevent the illegal use of the money. This is found at paras. 25 to 27 of the grounds of judgment.

[35] Madam Lim did not have any reason to suspect Chua was a fraudster. Chua was an employee of the respondent, a well-established licensed financial institution. Madam Lim had received 73 fixed deposit slips from Chua for the money deposited and all these acknowledgment slips bear the respondent's letterhead. Further, all the banker's cheques, cashier's orders and personal cheques given by Madam Lim to Chua were made payable in the name of Madam Lim, thus it could only be banked into an account bearing Madam Lim's name.

[36] Besides that, the evidence shows that Madam Lim also took the following steps as a prudent customer:

(a) Sometime in 2012, Madam Lim went to the respondent bank to check the status of the fixed deposits but was stopped by Chua on the pretext that since Madam Lim was a privilege banking customer she could only check with Chua and the bank manager and that since the bank manager was not around it could not be done. This was a lie and Madam Lim was unbeknown to her, completely misled by Chua.

(b) Subsequently, Madam Lim's husband went to the bank to request for a statement of accounts and Chua provided a bank account statement bearing the respondent's letterhead.

(c) Thereafter, Madam Lim's husband became suspicious with Chua and they made an appointment to see him. However, before the appointed date, Madam Lim went earlier to Plaza Mahkota Branch in June 2013 to enquire about the fixed deposits and then discovered the fraud.

[37] Insofar as the respondent is concerned, its witness, namely, SPK3, testified that there were checks and balance put in place to ensure that bank accounts to be opened followed standard operating procedures. However, despite these checks and balance, Chua had managed to defraud both Madam Lim and the respondent. The appellant did not lead any evidence or challenge the assertion of Madam Lim and the respondent to establish that the respondent could have done more to prevent the fraud or that they were lackadaisical.

[38] Hence, I find that the learned Sessions Judge had made a correct finding that Madam Lim and the respondent had done all that could reasonably be expected of them to prevent the illegal use of the funds.

[39] In the overall, I find that the decision of the learned Sessions Judge is well supported by the evidence and the law.

[40] The law on appellate intervention is well settled. An appellate court would not interfere with the findings of fact made by the trial court unless such findings are unsupported by or contrary to the evidence or where the trial court has so fundamentally misdirected itself as to the facts or the law. See *PP v. Munusamy* [1980] 1 LNS 63; [1980] 2 MLJ 133 FC; *PP lwn. Rashidi Abdullah* [2015] 3 CLJ 194; [2015] MLJU 329 CA; *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 CA; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1.

[41] The Federal Court in *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 in adopting the principles enunciated by the Privy Council in *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] 1 LNS 5; [1936] MLJ 110 had held that:

> ... the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

[42] In the present case, the appeal is primarily against the learned Sessions Judge's findings of fact. I do not find any misdirection nor was the trial judge plainly wrong in arriving at his findings and ultimate decision. There is proper evaluation of the evidence by the learned Sessions Judge. The decision arrived at by the trial court was with full judicial appreciation of the evidence and correct application of the relevant law. Thus, I do not find any reason for appellate intervention.

[43] Wherefore, I dismissed the appeal.